
IN THE 14

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

RAINIER BREWING COMPANY, a Corporation,
LOUIS HEINRICH and R. SAMET,
Defendants in Error.

No. 3383.

BRIEF OF DEFENDANTS IN ERROR.

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The defendants in error have served and filed a notice herein that at the time fixed for the argument on the writ of error in this action they will move for a dismissal of the writ upon the ground that the order and judgment of the District Court are not reviewable by the Circuit Court of Appeals, and that this Honorable Court has no jurisdiction to entertain such writ. We deem it sufficient to cite the following authorities in support of this motion:

U. S. v. Sanges, 144 U. S. 310, 36 L. Ed. 445;
U. S. v. Dickinson, 213 U. S. 92, 53 L. Ed.
711;
U. S. v. Evans, 213 U. S. 297, 53 L. Ed. 803;
U. S. v. Bitty, 208 U. S. 397, 52 L. Ed. 543, 5.

And see note to

U. S. v. Stevenson, 54 L. Ed. (U. S.) 153.

This rule has been applied in various Circuit Courts of Appeals:

- U. S. v. Baltimore etc. R. Co.*, 159 Fed. 33, 38 (C. C. A., Sixth Circuit);
U. S. v. Zarafonitis, 150 Fed. 97, 99 (C. C. A., Fifth Circuit).

II.

Without waiving our right to insist upon the above motion, we will briefly present the reasons why the demurrer in the court below, was properly sustained.

In the case of *Jacob Hoffman Brewing Co. v. McElligott* (District Court for the Southern District of New York), decided May 17, 1919, it was claimed by the plaintiff that the Act of November 21, 1918, commonly known as the "War Prohibition Act", did not prohibit the sale of a non-intoxicating beer. This point was vigorously contested by the government. Judge Hand, granting an injunction against the deputy collector of internal revenue, sustained plaintiff's position, and thereupon an appeal was prosecuted by the United States to the Circuit Court of Appeals for the Second Circuit. All of the judges of the Appellate Court concurred in the opinion that unless beer was in fact intoxicating, its sale was not denounced by the statute in question.

This same question arose in a large number of other District Courts, upon demurrers filed by the defendants to indictments or informations for selling beer. In each case, the government purposely omitted to

allege that the beer was an intoxicating liquor. Demurrers were sustained in the following cases:

- United States v. Rainier Brewing Co.* (the instant case);
- U. S. v. Baumgartner* (So. Dist. of California), August 8, 1919;
- U. S. v. American Brewing Co.* (Eastern Dist. of Louisiana), July 15, 1919;
- U. S. v. Mohr* (Western Dist. of Wisconsin), August 22, 1919;
- U. S. v. Hanley Brewing Co.* (Rhode Island), July 23, 1919;
- U. S. v. Standard Brewing Co.* (Maryland), July 1, 1919;
- U. S. v. Petts and Vogel* (Mass.), July 15, 1919;
- U. S. v. Porto Rico Brewing Co.* (Porto Rico), August, 23, 1919.

A contrary view was taken in the following cases:

- U. S. v. Stenson Brewing Co.* (Northern Dist. of Illinois), July 25, 1919;
- U. S. v. Pittsburg Brewing Co.* (Western Dist. of Penn.), July 15, 1919;
- U. S. v. Schmauder* (Connecticut), July 23, 1919.

In *U. S. v. Bergner & Engel Brewing Co.*, the District Court for the Eastern District of Pennsylvania held that it was a trial question, and for that reason neither sustained nor overruled the demurrer.

It will, therefore, be observed that a great majority of the Federal judges that have passed on this question have sustained our position.

III.

A proper construction of the clauses of the act of November 21, 1918, forbidding the sale of "beer, wine, or other intoxicating malt or vinous liquor for beverage purposes" after June 30, 1919, requires that the descriptive term "or *other* intoxicating malt or vinous liquor" be deemed to relate back and define the immediately preceding words "beer" and "wine", and if the rule of *noscitur a sociis* is ever to be employed as a canon of construction, it is applicable in the present instance because of the compactness of the whole clause and the close relation of the word "other" to the descriptive or defining word "intoxicating".

This Honorable Court, in the case of *Potts v. United States*, 114 Fed. 52, 54, in construing a statute providing "that no person, by force, threats, intimidations, or by any fencing or inclosing, *or any other unlawful means*, shall prevent or obstruct" any person from peaceably entering upon or establishing a settlement upon public lands, followed that doctrine. Circuit Judge Morrow, speaking for the Court, said:

"By a well-known rule of construction the words 'or any other unlawful means', in describing and giving scope to the prohibited acts, relate back to and qualify the preceding words 'fencing' and 'inclosing', so that those words must be read as '*unlawful* fencing' and '*unlawful* inclosing'."

The same rule of construction has been applied in the following cases:

- U. S. v. Chase*, 135 U. S. 255, 258;
- U. S. v. United Verde Co.*, 196 U. S. 207, 213;
- U. S. v. Loftis*, 12 Fed. 671, 673;

U. S. v. Clark, 43 Fed. 574;
Pacific Rolling Mill Co. v. Hamilton, 61 Fed.
 476, 477;
Gridley v. Northwestern Ins. Co., 14 Blatchf.
 107; affirmed 100 U. S. 614.

IV.

Defendants in error also respectfully claim that the attempt to enforce the penalties prescribed by the Act of November 21, 1918, is beyond the constitutional powers of the government. Assuming, for the purposes of argument, that Congress had the power, in virtue of the emergencies of war, to prohibit the sale of intoxicating liquors, it would seem plain that the expiration of the Act could not be made dependent upon conditions that might happen long after all emergency ceased to exist. If this were not true, then during the stress and exigencies of war, Congress might enact legislation that would continue to be enforceable until the happening of events that might take place years after the war actually came to an end, and thus invade, for a long period, the constitutional control of the several states in matters properly referable to their police powers.

The passing of any war necessity is shown by a consideration of the terms of the armistice, the manner and extent to which it has been carried out and performed by the defeated enemy, which every one knows, and the official statements and action of practically every department of the Government. A large proportion of these statements and action is reported in the Official U. S. Bulletin, which was published

daily by the Committee on Public Information, created by executive order of the President. This publication was an official Government publication, and therefore all official statements therein made by officers whose duty it was to make them, are admissible as evidence of the facts therein contained (Revised Statutes, section 882; *White v. United States*, 164 U. S. 100; *Oakes v. United States*, 174 U. S. 778; 3 Wigmore on Evidence, section 1630 *et seq.*), and the court should take judicial notice of them.

As is common knowledge, actual warfare has ceased, allied troops are occupying German territory, no enemy force is in France or Belgium, the German navy has been surrendered and a large part of it scuttled, and stupendous quantities of war supplies and materials, etc., yielded up by the enemy, in accordance with the terms of the armistice, to such an extent as wholly to justify the President's declaration that, "having accepted [and performed] these terms of armistice, it will be impossible for the German command to renew [the war]," and the recent acceptance by the Germans of the terms of peace conclusively establishes and confirms that fact.

The reports above referred to include official statements by the President and other Government officials recognizing that the war necessity has passed, referring to immediate discontinuance of induction into service and to the rapidity and extent of demobilization, mentioning the cancellation of contracts for war supplies, removing the restrictions imposed upon manufacture and business for war purposes, and proclaiming the

change in the food, fuel, labor and transportation situation from shortage to sufficiency or surplus and from Government restrictions to the withdrawal of all restrictions.

(1) The President has on a number of occasions referred to the fact that the war was practically ended, and that immediately following the armistice the country was under the necessity of returning with the utmost speed to a peace basis. In his address to Congress on November 11, 1918, he stated that "the war thus comes to an end" and "it will be impossible for the German command to renew it" (Nov. 11, 1918, p. 5).^{*} In his Thanksgiving Proclamation he referred to the complete victory which had brought us peace (Nov. 18, p. 1). In his address to Congress on December 2, he referred to the secure peace which followed the complete submission of the enemy and to the fact that the enemies' empires were in liquidation, that the necessity for taking over the railways had now been served, that the restrictions placed upon industry for war purposes had been removed, and that from the very moment of the armistice "we took the harness off" (Dec. 2, p. 1). On November 30, he approved the recommendation of the Chairman of the War Industries Board that this board be discontinued since it "was only a war making body" (Dec. 5, p. 1), and in his executive order of December 3 he recognized the cessation of the war activities of the government departments (Dec. 5, p. 4). In subsequent statements the

^{*} References, unless otherwise stated, will be to the Official U. S. Bulletin of the date mentioned.

President referred again and again to the fact that "the quiet of peace and tranquillity of settled hopes has descended upon us" (Dec. 27). In his address to the Senate on July 10, 1919, when he presented the Treaty of Peace, he said once more that "the war ended in November, eight months ago."

(2) Statements by other government officials are to the same effect. The Secretary of the Treasury, under date of November 14, referred to "the collapse of our enemies," and "the sudden cessation of the extraordinary demands upon our industry and products, consequent upon the conclusion of the war" (letter to Chairman of Senate Finance Committee, Official Bulletin, Nov. 15, pp. 1, 6). In his annual report, dated December 2, he said that "the war has been won and peace is assured," referred to "the rapidly changing conditions, incident to the transition from war to peace," and recommended to Congress that the amounts called for in the pending revenue bill be substantially reduced (Dec. 31, p. 7).

In one of the Federal Reserve Board reports subsequent to the armistice, the board referred to the changed position due to the "readjustment of trade and industry to post-war conditions" (Federal Reserve Board Bulletin for May, Official Bulletin, May 12).

The Chemical Warfare Service notified the Nation that it was unnecessary further to continue the saving of various materials required for gas defense purposes (Nov. 27, p. 7). Food Administrator Hoover, on Monday afternoon, November 11, said (Nov. 12, p. 3):

“With the war effectually over, we enter a new economic era and its immediate effect on prices is difficult to anticipate.”

(3) The War Department has been straining every effort from the very date of the armistice to demobilize our army and to restore the country to a peace basis. The Secretary of War immediately “suspended further calls under the draft and inductions” (Nov. 11, p. 1), and made the following statement (Nov. 12, pp. 1, 6) :

“* * * the President directs that all general and voluntary special calls now outstanding for the induction and mobilization of registrants of whatever color or physical qualifications for the Army, be and the same are, hereby cancelled. * * * The President further directs that all registrants who are already inducted into the Army * * * but who have not been actually entrained for a mobilization camp, shall be and that they are hereby discharged from the Army.”

On November 16, the Provost Marshal General directed all state headquarters to cease immediately the physical examination of draft registrants and to discontinue the work of the district boards (Nov. 18, p. 1). In the same month, the War Department issued a circular to all Commanders reading (Nov. 21, p. 1) :

“1. The President has determined * * * that the public service will be promoted by the discharge as rapidly as their services can be spared of officers in the United States Army excepting those holding commissions of any kind in the regular Army.

“2. Department Commanders, Commanders of Ports of Embarkation, all Chiefs of Staff, Corps

and Departments are authorized and directed to discharge such officers of the line and staff as are under their command as rapidly as circumstances permit.

“3. * * * such discharges will be a complete separation of the individual from the military service. * * *”

A circular dated March 28, provides (March 31, p. 5):

“The attention of all is again directed to the importance of discharging from the military service as rapidly as they can be spared, all men drafted or enlisted only for the period of the emergency.”

The army demobilization statistics especially constitute quite conclusive proof that the war necessity has long since passed. The Chief of Staff, following the armistice, issued weekly reports of the progress of demobilization. Men were returned from France in increasing numbers, from 25,000 in November to 200,000 in March, and since then, they have been returned in even larger numbers (Feb. 20, p. 1). By January 24, over 900,000 men and officers had been discharged (Jan. 25, p. 8); by March 24, approximately 1,500,000 men and officers had been discharged (March 24, p. 5); by May 24, the Chief of Staff reported that “the demobilization * * * has reached 2,215,161 * * * A total of 1,152,427 officers and * * * men sailed from Europe since November 11. * * * *All divisions but the regular divisions will have sailed by June 12 from France*” (June 2, p. 8).

The President was, therefore, most moderate in his statement to Congress on May 20, 1919, that—

“The demobilization of the military forces of the country has progressed to such a point that it seems to me entirely safe now to remove the ban upon the manufacture and sale of wines and beers” (May 26, p. 8).

(4) All contracts for the production of war materials are being terminated with the utmost rapidity, and the surplus supplies bequeathed by the war to a country now practically at peace are being disposed of with equal speed. Shortly after the armistice, the War Department established elaborate machinery for the cancellation of outstanding contracts for war supplies (Nov. 14, p. 1; Nov. 16, pp. 1, 5).

On June 2, the War Department reported that it had suspended the performance of 24,000 supply contracts which would have involved an expenditure of \$6,000,000,000; that practical agreements with the contractors had been made as to 2,500 other contracts; that substantially all remaining contracts were being examined for purposes of cancellation and that “in spite of the difficulties to be overcome, * * * more than seventy-five per cent. (75%) of the actual work to be done is behind us” (June 2, pp. 10, 11). “Of the uncompleted portions of contracts * * * outstanding on Nov. 9, 1918, only * * * 6 per cent. remained on April 26” (May 22, p. 4). By May 8, 1919, all but eleven of the 1,200 quartermaster’s contracts in force abroad had been liquidated (June 16, p. 3).

The War Department has discontinued the construction of and has abandoned scores of training camps, cantonment buildings, proving grounds, army flying fields, storage yards and buildings, sanitation plants, army tent camps, motor school buildings, hospitals and other army construction projects (Dec. 2, p. 14; Dec. 6, p. 2; Dec. 10, p. 3; Dec. 16, p. 3; Dec. 17, p. 2; Dec. 31, p. 2).

Shortly after the armistice, the War Department created a special division for the disposal of war materials purchased for the army, and later appointed a director of sales of such materials (Dec. 10, p. 2; Mar. 3, p. 1). In the first four and one-half months of 1919, this director had sold about a quarter of a billion dollars worth of supplies, including lumber, copper, army animals, caustic soda and ash, iron and steel, nitrates, explosives, motor trucks, locomotives, cranes and wool stocks (May 26, p. 1); by June 20, the total had risen to one-third of a billion (July 7, p. 8). The War Department has transferred about 40,000 motor vehicles to peace departments—Post Office, Public Health Department, Bureau of Public Roads, etc. (June 16, p. 1). The War Department has recently sold \$15,000,000 worth of material to Russian co-operative associations (June 30, p. 10). On June 30, the Department called for bids for canned corn, peas and beans which it was holding as surplus in thirteen supply zones of the United States (June 30, p. 11). The Secretary of War went to France in April in order to dispose of all the installations in France, including docks, warehouses and railroad facilities (May

12, p. 14). By March considerable of the ammunition which had been previously sent to France, had already been returned to this country. And the War Department on June 9, 1919, announced that it had rescinded its rule against the enlistment of enemy aliens in the army (June 9, p. 2).

(5) Almost all the restrictions imposed upon commerce and industry for war purposes have now been removed. On November 12 the War Industries Board began (Nov. 13, pp. 1, 7)—

“a modification of the restrictions whereby it has controlled American industry in the interest of the Nation’s war program.”

On November 21 the Board announced the formal cancellation of all except a few outstanding priority ratings (Nov. 21, p. 3), and by December 12 it announced the discontinuance of price-fixing (Dec. 12, p. 4). On November 21, “all remaining restrictions on non-war construction throughout the United States were officially removed” (Nov. 22, p. 1). By January 1, the War Industries Board and the restrictions which it had placed upon American industry for the purpose of prosecuting the war were out of existence (Dec. 5).

The War Trade Board has removed the great mass of the restrictions which it had imposed upon imports and exports for war purposes. A large body of the cable, postal and shipping censorship regulations have been removed (see from Dec., 1918, to May, 1919). On November 14, the Chairman of the Committee on

Public Information announced that the voluntary press censorship had been discontinued (Nov. 14, p. 1).

And it has recently been declared that virtually unrestricted trade by Americans with Germany will now be licensed and permitted (*New York Times*, July 12).

(6) With respect to food products, the Food Administration on December 5 officially reported that there was a sufficient supply for economical use of wheat, rye, beans, peas and rice, and as early as March 3, the War Department began to dispose of its reserve stocks of foodstuffs in France (Dec. 5, p. 7, March 3, p. 2).

The orders for the curtailment of the production of soft drinks had been rescinded by November 14, and the restrictions on the use of all-wheat-bread and the requirement of grain substitutes in bread were rescinded (November 14, pp. 1, 4). By December 11 the restrictions on the use of sugar were lifted (Dec. 11, p. 4). At that early date the Food Administration stated that—

“The European Nations can again draw upon the wheat supplies in India and Australia. * * *

“It will also be possible to tap accumulated supplies in the Argentine.”

The orders affecting public eating places were rescinded December 23 (Dec. 23, p. 1). Various license requirements were withdrawn with respect to grains, meats and other foods by February 1, and others by March 12 (Feb. 1, p. 1, March 12, p. 1).

The Federal Reserve Board reported by March 27, that the opening of all of the grain supplies of other lands "has naturally operated to curtail the demand for our wheat abroad."

In his second weekly bulletin covering the week ended May 16th, Mr. Barnes, the wheat director of the Food Administration Grain Corporation, stated:

"The shipments in relief of Europe, outside of the Allies, are now being rapidly completed, and within the next week practically the last shipments of foodstuffs for liberated regions will be completed" (June 2, p. 3).

The surplus of food supplies held by the War Department was ready for announcement early in February, but the supplies were withheld from sale to avoid flooding the food market. On July 8 the surplus stores of meats and vegetables were in excess of \$130,000,000 (see testimony of Chief of Staff, U. S. Army, before House of Representatives' sub-committee investigating army food supplies—New York *Times*, July 12).

(7) The grave fuel shortage which confronted the country before the armistice has been succeeded by a fuel surplus, and the restrictive fuel orders have been revoked (Jan. 10, p. 1; Feb. 1, p. 2). On May 15 the United States Fuel Administration issued an order vacating all rules, regulations, or orders governing licensees engaged in importing, manufacturing, distributing, or transporting oil or gas (May 19, p. 1). The Government reported by March 25, that there had been a substantial reduction in the coal output because of the "lack of demand" for coal (March 25, p. 8).

(8) Before the armistice there had been a great shortage of labor for production of war materials. Since the armistice the manufacture of this material has practically ceased, and unemployment has become acute. At the conference of Governors held December 16-18, (to quote from the statement of the Department of Labor), "an important feature [of the conference] was consideration of the problem of unemployment presented by demobilization of the forces, and by the sudden release of many thousands of industrial workers from essentially war industries" (Monthly Labor Review, March, pp. 53-54). The United States Labor Department in March referred to "the problem of unemployment now so acute" (*id.*), and it has officially reported that the estimated surplus of workers has "increased rapidly from 10,368 on November 30, 1918, to 358,890 on March 1, 1919" (*id.* pp. 145-146). The Department further reported that "there is an increase in unemployment for the current week, as well as a heavy increase in the area of unemployment" (Mar. 20, p. 5).

In addition to the plans formulated for government work, numerous conferences were held with a view to increasing the amount of non-war work in the country. A conference of Governors and Mayors was held for this purpose at the White House on March 3rd and 4th (March 3, p. 2); the War Department sent out a call urging the Draft Boards all over the country to assist in securing employment for the returning soldiers (Dec. 20, p. 1); the assistance of the churches was invoked and a special day set aside by the Presi-

dent to be known as "Employment Sunday" (April 28, p. 7), and the Government stimulated state and municipal public works in order to relieve unemployment (Nov. 21, p. 4; Mar. 20, p. 8).

The passing of the war necessity is further shown, both with respect to the unemployment situation and with respect to the demobilization of the Washington governmental departments engaged upon war work, by the report of the War Department of December 16th, to the effect that—

"The thousands of civilian war workers in the Government service who will soon be dismissed because their services are no longer needed will be assisted in finding re-employment through plans now being arranged by the United States Civil Service Commission."

(9) The transportation situation also emphasizes that the war necessity has passed. On December 11, the Director General of railroads issued a statement in which he promised adequate railroad service for civilian needs by reason of "the war now being practically over," and the next day declared that "the war is ended" (Dec. 11, p. 4; Dec. 12, p. 6).

The shipbuilding program, which was at the heart of the country's war program, was cut down immediately after the armistice. From that day to April 25, the United States Shipping Board cancelled contracts for more than 2,000,000 tons of steel ships (May 5, p. 6). By the beginning of May, the United States Emergency Fleet Corporation was advertising the sale of scores of completed and partially completed ships and barge hulls (May 8, pp. 2-3).

The War Trade Board, in concurrence with the United States Shipping Board, stated on February 3, that the Government would immediately return the Dutch ships which had been taken over during the war and that "*this action is to be carried out because the war emergency and necessity under which the ships were taken over has passed*" (Feb. 3, p. 1). Similarly, the United States Railroad Administration stated on February 27, that "*following the signing of the armistice and the passing of the emergency war necessity, it was decided that the maintenance of these lines [the coastwise steamship lines] under federal control was no longer necessary*" (Feb. 27, p. 6).

In view of these official declarations there surely cannot be any reasonable doubt that there was in fact no war necessity or emergency on May 1, and none since then, which would warrant the sacrifice of private property and business without compensation, and the denial to individuals of the liberty to pursue their business.

We therefore respectfully submit:

1. That the writ of error should be dismissed for want of jurisdiction;
2. That the demurrer of the court below was properly sustained, for the reason that the information failed to state that the beer was an intoxicating liquor;
3. That the War prohibition legislation is no longer constitutionally effective.

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